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IN THE COURT OF APPEALS OF INDIANA

RICHARD T. SCHILSON,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 15A04-0712-CR-686
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE DEARBORN CIRCUIT COURT
The Honorable James Humphrey, Judge
Cause No. 15C01-0603-FA-3

June 18, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

CRONE, Judge

Case Summary

Richard T. Schilson appeals his convictions and sentences for class B felony criminal deviate conduct and class D felony possession of child pornography. We affirm.

Issues

Schilson raises three issues, which we restate as follows:

I. Whether the trial court abused its discretion by admitting the testimony of clinical psychologist Connie Boehner;

II. Whether the trial court abused its discretion by admitting testimony regarding a pornographic photograph recovered from Schilson's residence; and

III. Whether his sentence is inappropriate.

Facts and Procedural History

On or about July 5, 2004, eighteen-year-old A.C. moved in with her twenty-eight-year-old friend Brandie. Schilson is Brandie's father, and she lived with him and her stepmother, Delores. Brandie had offered A.C. a place to live after A.C. had an argument with her parents. Brandie had told A.C. that Schilson was in the Mafia or the Green Berets, and A.C. noticed that Schilson often gave Brandie large amounts of cash. A.C. slept in Brandie's bedroom. Schilson insisted that she and Brandie leave the door open when they took showers, but A.C. did not comply. Schilson told A.C. that he was in the Mafia and the Green Berets, that he assassinated people, and that "he was like a powerful man that could have anybody killed." Tr. at 78. Schilson also told her that he controlled the local police department. A.C. believed his claims.

One night, Schilson, A.C., Brandie, and a male friend of Brandie's sat in the kitchen and talked. A.C. was drinking alcohol that Schilson had served her. Schilson showed A.C. his large collection of weapons, including several guns and knives. He told her that these were the weapons he had used to kill people. He said that he had been contracted to kill a family, and that he was going to use the money he made from that "job" to move to California to run a prostitution ring. Schilson touched A.C.'s buttocks and told her that he had not had sex in a while because his wife was not physically able to have sex. He asked A.C. to give him "a blow job" and told her that he wanted to "rate [her] to see how he could sell [her] in California." *Id.* at 83.

When A.C. refused to perform oral sex on Schilson, he said that "he would have anybody taken out or killed if … they didn't do what he wanted them to do." *Id.* He threatened to kill A.C.'s family if she did not do what he asked. Brandie told A.C. that she should listen to Schilson. A.C. was scared, so she performed oral sex on Schilson until he ejaculated in her mouth. When he told her to swallow his semen, she did.

A.C. went to bed immediately after the assault, and she contacted her parents the next day and returned to their home two days later. A.C. did not report the assault because Schilson had told her that he would kill her or have someone kill her if she did so. Brandie's fear of Schilson also prevented her from reporting the incident to police.

On January 1, 2005, Brandie reported Schilson's assault on A.C. to the Greendale Police Department. The department contacted A.C., and she also made a report. The police obtained a search warrant for Schilson's house, and they found guns, knives, and a large

collection of pornography, including images of girls appearing to be fifteen years old or younger.

On March 15, 2006, the State charged Schilson with class A felony criminal deviate conduct, class D felony sexual battery, class D felony possession of child pornography, and class A misdemeanor obscene performance. On August 31, 2007, the State dismissed the sexual battery and obscene performance charges and amended the child pornography count. On September 7, 2007, a jury found Schilson guilty of class B felony criminal deviate conduct and class D felony possession of child pornography. On October 30, 2007, the trial court sentenced Schilson to twenty years, with five years suspended, for the criminal deviate conduct conviction, and three years for the child pornography conviction. The trial court ordered these sentences to run concurrently. Schilson now appeals his convictions and sentence.

Discussion and Decision

I. Admission of Expert Testimony

Schilson argues that the trial court erred by admitting the testimony of Connie Boehner, a clinical psychologist. Our standard of review is well settled.

> [T]he admission of evidence is within the sound discretion of the trial court and the decision will not be reversed absent a showing of manifest abuse of discretion resulting in the denial of a fair trial. An abuse of discretion involves a decision that is clearly against the logic and effect of the facts and circumstances before the court. We also note that relevant evidence, which is evidence having any tendency to make the existence of any fact or consequence more or less probable, is admissible. However, relevant evidence should nevertheless be excluded if the probative value of the evidence is substantially outweighed by its prejudicial effect.

Book v. State, 880 N.E.2d 1240, 1250 (Ind. Ct. App. 2008) (citations omitted), *trans. denied*. Even if the trial court abused its discretion, we will not reverse a conviction unless the defendant can establish that the trial court's error prejudiced his substantial rights. *Martin v. State*, 622 N.E.2d 185, 188 (Ind. 1993). The improper admission of evidence is harmless if there is substantial independent evidence of guilt sufficient to satisfy us that there is no substantial likelihood that the improperly admitted evidence contributed to the conviction. *Winbush v. State*, 776 N.E.2d 1219, 1221 (Ind. Ct. App. 2002), *trans. denied* (2003).

Dr. Boehner testified that she is a licensed clinical psychologist at an area mental health center and serves as director of the Dearborn County rape crisis program. She explained that she specializes in treating psychological trauma victims, including those suffering from sexual assault trauma. Early in her testimony, Dr. Boehner clarified that she had never met nor treated A.C. and that the purpose of her testimony was "to provide an understanding of how victims might react to sexual assault." Tr. at 63. She stated, based on her knowledge of reporting statistics, that it is "common" for a sexual assault victim to delay reporting the incident or to choose not to report it at all for several reasons, including embarrassment, fear of retaliation by the attacker, and lack of trust in the legal system. *Id*. at 65.

Schilson argues that Dr. Boehner's testimony was inadmissible for three reasons: (1) its relevance was substantially outweighed by the danger of unfair prejudice, pursuant to Indiana Evidence Rule 403; (2) it amounted to improper vouching for A.C.'s credibility as a witness, in violation of Indiana Evidence Rule 704(b); and (3) the State failed to establish

reliable scientific principles upon which Dr. Boehner's testimony rested, pursuant to Indiana Evidence Rule 702(b).

We need not determine whether the trial court abused its discretion in admitting Dr. Boehner's testimony because we conclude that any error was harmless. Clearly, Schilson's conviction is supported by other evidence, including A.C.'s testimony, Brandie's testimony, and the testimony of Greendale Police Department Officer Kendle O'Dell Davis regarding his investigation of the case. This is substantial independent evidence of Schilson's guilt sufficient to satisfy us that there is no substantial likelihood that Dr. Boehner's testimony contributed to his conviction. Thus, Schilson has failed to demonstrate that the admission of Dr. Boehner's testimony prejudiced his substantial rights, and we will not reverse his convictions on this ground.

II. Admission of Officer's Testimony about Photograph

At trial, Officer Davis testified as to a photograph recovered from Schilson's home. The photograph, identified as having been downloaded from a website called www.rapetv.com, depicts a naked young woman sitting on a couch with a man's hand behind her head appearing to pull her head down toward him. Schilson contends that the trial court abused its discretion in admitting Officer Davis's testimony describing the photograph and accompanying website text. Prior to the officer's testimony, the court held a conference outside the presence of the jury regarding the admissibility of certain pornographic images discovered during a police search of Schilson's home. With regard to the image at issue, Schilson's counsel argued in relevant part:

> Well, I would object to the picture actually being shown to the jury, we observed that picture in chambers. I also went down and looked at the website to the extent to where they found the picture and the description that goes along with the picture. … The picture itself is open to all kinds of speculation. … Therefore I would object to the picture being in evidence. … [T]he officer can testify as to what he saw on the … when he looked at the picture, he could testify to what he saw, I don't think that the officer can testify one way or the other as to whether or not that was simulated for purposes of making a movie, or was actual video tape of a rape, the description does note that it's between a husband and wife and I would want that to be included in the testimony, and then I would ask that there be a limiting instruction given that the only reason the testimony is admitted, is to go to intent and not to be used as evidence of commission of a crime. That would be our position on that particular picture, Your Honor.

Tr. at 172-73.

The trial court permitted Officer Davis to describe the photograph to the jury. He stated that the website included a description of the photo indicating that it depicted a husband forcing his wife to perform oral sex because "she had not poured his soda correctly, and he was going to teach the bitch a lesson." *Id*. at 193. Following the officer's testimony, the trial court gave the following limiting instruction:

> Members of the jury, evidence has been introduced that the defendant was involved in bad acts other then those charged in the Information. This evidence has been received solely on the issue of defendant's intent and motive, and this evidence should be considered by you only for that limited purpose.

Id. at 196.

When a limiting instruction is given that certain evidence may be considered for only a particular purpose, the law will presume that the jury will follow the trial court's admonitions. *Ware v. State*, 816 N.E.2d 1167, 1176 (Ind. Ct. App. 2004). Schilson's counsel did not object to the admission of Officer Davis's testimony regarding the photograph. In

fact, he agreed to its admission and suggested that the court provide a limiting instruction, thus inviting the very error he now appeals. "A party may not invite error, then later argue that the error supports reversal, because error invited by the complaining party is not reversible error." *Gamble v. State*, 831 N.E.2d 178, 184 (Ind. Ct. App. 2005) (quoting *Kingery v. State*, 659 N.E.2d 490, 494 (Ind. 1995)), *trans. denied*. Schilson's appeal on this issue is therefore waived. *See id*.

Waiver notwithstanding, as noted above, there is substantial independent evidence supporting Schilson's convictions. Therefore, Schilson has again failed to demonstrate harm to his substantial rights. Even if we found that the trial court had abused its discretion by admitting this portion of Officer Davis's testimony, it would amount to harmless error and would not warrant a reversal of Schilson's convictions.

III. Appropriateness of Sentence

The statutory sentencing range for a class B felony conviction is six to twenty years, with the advisory sentence being ten years. *See* Ind. Code § 35-50-2-5. For Schilson's criminal deviate conduct conviction, the trial court sentenced him to twenty years, with five years suspended to probation. The statutory sentencing range for a class D felony is six months to three years, with the advisory sentence being eighteen months. *See* Ind. Code § 35-50-2-7. The trial court sentenced Schilson to a concurrent sentence of three years for his child pornography conviction. Schilson raises two sentencing claims, although he identifies only one of them. First, Schilson contends that the trial court erred by applying improper aggravating circumstances. *See id.* at 490 (holding that remand for resentencing may be appropriate remedy if trial court cites aggravators that are improper as a matter of law). We

review this type of claim under an abuse of discretion standard. *Id*. at 490-91. Second, Schilson requests that we revise his sentences pursuant to Indiana Appellate Rule 7(B):

> The Court may revise a sentence authorized by statute if, after due consideration of the trial court's decision, the Court finds that the sentence is inappropriate in light of the nature of the offense and the character of the offender.

The burden is upon Schilson to persuade us that his sentence has met the inappropriateness standard of review. *See Anglemyer v. State*, 868 N.E.2d 482, 493 (Ind. 2007).

Schilson argues that the trial court improperly cites as aggravating circumstances facts that comprise material elements of the crimes for which he was convicted. A fact that comprises a material element of a crime may not constitute an aggravating circumstance supporting an enhanced sentence. *Manns v. State*, 637 N.E.2d 842, 844 (Ind. Ct. App. 1994). Specifically, the trial court noted that Schilson threatened A.C. and her family, a fact that satisfies the "force or imminent threat of force" element of criminal deviate conduct. *See* Ind. Code § 35-42-4-2. We note, however, that the threats of force in this case were particularly disturbing. The evidence showed that Schilson repeatedly bragged to A.C. about his violent tendencies in the weeks leading up to this crime, suggesting that he was deliberately preparing A.C. to become his victim. We note that the trial court may consider the "particularized individual circumstances" of a crime's factual elements and may enhance a sentence if an element is particularly egregious. *Smith v. State*, 655 N.E.2d 532, 540 (Ind. Ct. App. 1995), *trans. denied*.

Also, the trial court stated that Schilson possessed a "significant collection of pornography depicting rape and sexual contact with children and animals[.]" Tr. at 276.

According to Schilson, "one must possess [these] kinds of images" in order to be found guilty of possession of child pornography. Appellant's Br. at 21. The relevant statute defines child pornography as an image ("*a* picture[,]" "*a* drawing[,]" "*a* photograph[,]" "*a* videotape[,]" etc.) that depicts or describes "sexual conduct" by a child who is or appears to be less than sixteen years old. *See* Ind. Code § 35-42-4-4 (emphases added). "Sexual conduct" includes "sexual intercourse, deviate sexual conduct, exhibition of the uncovered genitals intended to satisfy or arouse the sexual desires of any person, sadomasochistic abuse, [and] sexual intercourse or deviate sexual conduct with an animal[.]" *Id.*

In short, the statute indicates that possession of *one* image of child pornography could result in a conviction under this statute. As noted by the trial court, Schilson possessed numerous images depicting young girls participating in many types of the sexual conduct described in the statute, including intercourse with animals and forced oral sex. In our view, it was not improper for the trial court to consider the amount and types of images as an aggravator in this case.

In considering Schilson's inappropriateness claim, we note that the advisory sentence is the starting point the legislature has selected as an appropriate sentence for the crime committed. *Anglemyer*, 868 N.E.2d at 494. Here, the advisory sentences for Schilson's crimes were ten years and eighteen months, respectively, and the trial court imposed sentences of twenty years and three years. As for the nature of the offenses, the record reveals that the threats of force made by Schilson in this case were multiple and extreme. During the weeks leading up to his assault of A.C., Schilson told her that he was a member of the Mafia and the Green Berets and that he killed people, even whole families, for money.

He showed her his many guns and knives. He told her that his wife was unable to give him the sex that he needed. He knew that A.C. was estranged from her parents and needed a place to stay. He gave her alcohol prior to forcing her to perform oral sex. He forced A.C. to swallow his semen. He assaulted her in the presence of his daughter and her friend. As for the possession of child pornography conviction, Schilson was shown to have in his possession many images of child pornography downloaded from various websites. It is apparent from their domain names that many of these sites focused on children. As discussed above, these were images of girls in many pornographic situations, including bestiality and forced oral sex.

As for Schilson's character, the trial court concluded that he told "constant and elaborate lies." *Id*. at 276. He certainly did not accept responsibility for his crimes. He testified that Brandie had forced A.C. into performing oral sex on him, and he claimed that he was "upset and mad," as though he had been victimized. *Id*. at 154. At sentencing, he told the court that he had downloaded all the pornographic images for his terminally ill brother-in-law because he "just wanted to do something to make somebody happy." *Id*. at 249.

Based upon the foregoing, the aggravating factors cited by Schilson in his appeal were not improper and therefore, the trial court did not abuse its discretion in considering them at sentencing. Moreover, Schilson has failed to prove that his twenty-year and three-year concurrent sentences are inappropriate in light of the nature of his offenses and his character. We hereby affirm his convictions and sentences.

Affirmed.

BARNES, J., and BRADFORD, J., concur.